**IN THE HIGH COURT OF JUDICATURE AT BOMBAY**

**APPELLATE SIDE**

**CRIMINAL APPEAL NO. 840 OF 2001**

SAMIR NIJAM LANDGE )
R/o Varana Colony, Tulashi )
Prakalp, 3B-P-, Room No.12, )
Nagala Park, Dist. Kolhapur ) ..APPELLANT

Versus

THE STATE OF MAHARASHTRA )
(At the instance of Sr. P.I. )
Shahupuri Police Station, )
Dist. Kolhapur ) ..RESPONDENT

Mr. A. P. Mundargi h/f Ganesh Gole for appellant

Mr. F. R. Shaikh, APP

CORAM:-SMT. RANJANA DESAI &
D. G. KARNIK, JJ.

DATE ON WHICH THE JUDGMENT RESERVED:- 26th APRIL, 2006

DATE ON WHICH THE JUDGMENT PRONOUNCED:- 4th May, 2006

JUDGMENT:-(Smt. Ranjana Desai, J.)

. The appellant was tried in the court of the III Additional Sessions Judge, at Kolhapur in Sessions

Case No. 187 of 2000 for offences punishable under Section 394 and 302 of the Indian Penal Code ("I.P.C." for short). By his judgment and order dated 31/8/2001, the learned Sessions Judge convicted the appellant-accused for the offence punishable under Section 302 of the I.P.C. and sentenced him to suffer imprisonment for life and to pay fine of Rs.200/- in default to suffer R.I. for one month.

2. The appellant was further convicted for the offence punishable under Section 394 of the I.P.C. and sentenced to suffer R.I. for 2 years and to pay fine of Rs.200/- in default to suffer R.I. for one month. The substantive sentences were ordered to run concurrently. Being aggrieved by this judgment and order, the appellant has preferred this appeal.

3. Shortly stated the prosecution case is that deceased Khanderao Kerba Vhatkar was serving in Shahu Co-operative Sugar Factory, Kagal as a peon. He was residing in a room at the back of Yashodhan Hostel, Nagala Park. He was unmarried and was staying alone. Complainant Jeevan Jaywant Kamble was also residing at Nagala Park.

4. On 4/8/2000 at about 11-45 p.m. Karansingh Thapa, Watchman of Yashodhan hostel came to his house and told him that the deceased was shouting loudly. Thereafter the complainant and Karansingh went to the room of the deceased. Students of the said hostel also gathered there. They knocked at the door of the room. One person from the said room told them that the deceased was vomiting and, therefore, they should go away. However, the complainant and others asked him to open the door. The said person opened the door and started running away. The complainant and others caught hold of him. They locked him in the room of the hostel. Then they went to the room of the deceased. The deceased was lying dead. He was naked. They went back to the room where the appellant was kept. He told them that his name was Samir Nijam Landage and he was a resident of Warna Colony. He told them that he had murdered the deceased. Thereafter the complainant lodged his complaint at the Shahupuri police station. It is at Exh.29. On the basis of the same, offence came to be registered and investigation was started. After completion of the investigation the accused came to be charged as aforesaid.

5. In support of its case, the prosecution examined as many as 17 witnesses. The prosecution inter alia examined PW 9 Kerba Tukaram Vhatkar, father of the deceased, PW 5 Jeevan Jaywant Kamble, the complainant, PW 17 Dr. Rajeya Maruti Desai, who had examined the appellant on the next day and PW 4 Dr. Mansingrao Naikrao Ghatge, who had conducted postmortem of the deceased. PW 3 Kiran Ramchandra Takle is the pancha to memorandum Exh.-24 and panchnama Exh.-25 regarding recovery of gold ornaments and weapon at the instance of the appellant.

6. The appellant claimed to be innocent. He filed a written statement setting out his defence. According to the appellant, he had gone to the house of the deceased for repairing TV. At that time the deceased wanted to have unnatural sex with him. He removed his clothes and attacked the appellant. The appellant suffered injuries. The appellant apprehended that the deceased might subject him to unnatural sex and, therefore, to protect himself he used a weapon which was lying there and attacked the deceased. Thereafter he got scared and he surrendered to the police. He denied

that he had committed any theft.

7. After perusing the evidence on record, the learned Sessions Judge was of the view that the prosecution has proved its case beyond reasonable doubt. He, therefore, convicted the appellant as aforesaid and hence this appeal.

8. We have heard Mr. Mundargi, the learned Senior Counsel appearing for the appellant and the learned APP at great length. With their help we have gone through the evidence and the record.

9. Mr. Mundargi, the learned Senior Counsel contended that the trial court has wrongly convicted the appellant. He submitted that the prosecution has not adduced any evidence to establish that the appellant had committed the murder of the deceased. The learned counsel submitted that the case of the prosecution that the appellant robbed the deceased of his jewellery and then murdered him and hid the jewellery and the weapon in the room in the hostel where he was kept by the persons who apprehended him is inherently improbable. The prosecution has fabricated this case. He submitted that it is inconceivable that

if the appellant had used a sattur to assault the deceased the persons who apprehended him could not have noticed it. A big weapon like sattur cannot be hidden by any one. Mr. Mundargi, urged that in any case there is sufficient evidence on record to indicate that the deceased wanted to subject the appellant to unnatural sex. The deceased was found naked. There were injuries on the appellant. This is consistent with the defence version that the deceased wanted to have unnatural sex with the appellant and in order to protect himself the appellant attacked the deceased. He submitted that, therefore, the assault was made by the appellant in exercise of his right of private defence. The present case is clearly covered by clause. Fourthly of Section 100 of the I.P.C. Mr. Mundargi urged that in any case, if this court is of the view that the appellant has exceeded his right of private defence then at the most he could be convicted under Section 304 Part II of the I.P.C. as he had no intention to murder the deceased.

10. Mr. F. R. Shaikh, the learned APP on the other hand submitted that the appellant has been rightly convicted under Sections 302 and 394 of the

I.P.C. He submitted that the appellant was caught on the spot. He confessed to the crime. At his instance sattur and ornaments of the deceased were found. It is clear from the evidence that the appellant had borrowed the scooter of his friend, changed its name plate and used it for coming to the house of the deceased. Therefore, intention to commit robbery and murder and hide himself from the police is very much present. The learned APP contended that, therefore, this court should not interfere with the impugned judgment and order.

11. We have considered the submissions of the learned counsel in depth. PW 5 Jeevan Kamble is the complainant. He has stated that he is residing in Yashodhan hostel, Kagala Park along with his wife and children. He is serving in Ghadge Developers as a peon. He knew the deceased who was serving in the office of Shahu Co-operative Sugar Factory as a peon. He was residing in the back portion of the office of Shahu Co-operative Sugar factory. According to him on the date of incident at about 11-45 p.m. Karansingh Thapa, the watchman came to him and told him that the deceased was moaning in his room and they should go and see what had happened. Therefore, he went to the room of

the deceased along with Karansingh Thapa. He knocked the door of the deceased. Someone was moaning in the room. Students of the hostel also came there. They knocked at the door. A person came out. He was trying to run away. Jeevan Kamble, Pavan Desai, Dhondiram Hajare caught him and took him to a room of the hostel and locked him in that room. Thereafter they came back to the room of the deceased. They found that the deceased was lying dead in the room. The deceased was naked. They went back to the room where the appellant was locked. The appellant told them his name. He told them that he had murdered the deceased. Thereafter they went to the police station where complaint of Jeevan Kamble was recorded. It is at Exh.-29. This witness has been cross-examined at some length. In the cross-examination he has stated that there was a scuffle between the appellant and those who had gathered there. He has stated that they had not seen any ornaments or weapon on the person of the appellant at that time.

12. Sofar as the deposition of this witness that the appellant was apprehended when he was trying to run away is concerned there is hardly any challenge

to it in the cross-examination. The finding of the dead body of the deceased in his house has also not been challenged. Jeevan Kamble's evidence is consistent with the F.I.R. lodged by him.

13. PW 7 is Santosh Annasaheb Patil. He was residing in Yashodhan hostel. According to him on 4/8/2001 at about 11-45 p.m. he heard noise coming from the back of the hostel. He went there. Watchman Karansingh Thapa and PW 5 Jeevan Kamble were present there. He has corroborated the version of PW 5 Jeevan Kamble, as regards knocking at the door of the deceased and apprehending the appellant while he was trying to run away after opening the door and finding of the dead body of the deceased in naked condition in the room. In cross-examination he has stuck to his version in the examination-in-chief.

14. PW 6 is Dhondiram Balu Hajare. He was working as a medical representative. On the day of the incident, he was residing in Yashodhan hostel. According to him he and other students had gathered near the room of the deceased, after hearing loud noise from the back of the hostel. He has also corroborated PW 5 Jeevan Kamble as regards the

apprehending of the appellant and finding of the dead body of the deceased in the house. According to him they caught the appellant. Thereafter they confined him in one room of the hostel. The appellant told them his name as Samir Nijam Landge. In the cross-examination he has said that the deceased was lying in a naked condition. According to him there was no scuffle between him and the appellant and others.

15. PW 10 is PHC Manohar Narayan Tipugade, who was attached to Shahupuri Police Station, at the relevant time. He has deposed about the recording of F.I.R. of PW 5 Jeevan Kamble.

16. PW 3 Kiran Ramchandra Takle is a pancha to Exhibits 24 and 25. According to him on 5/8/2000, the accused made a statement that he will produce three rings, one gold bracelet and a sattur. His statement was recorded at Exh.-24. Thereafter the appellant led them to a room in Yashodhan Hostel. There was a cupboard fixed in the wall in the said room. There were newspapers in the cupboard. The appellant took out three golden rings, one bracelet of gold and a sattur from the said newspapers. Panchnama Exh.-25 was recorded. This discovery is

also deposed to by PW 16 Manoj Govind Patil, DY.S.P. Kolhapur, who was investigating the case.

17. PW 4 Dr. Mansingrao Naikrao Ghatge had done postmortem on the deceased. Dr. Mansingrao found the following external injuries on the deceased:

1) I inch above stendnotch extends from in to the Rt side neck to RF side neck just above claricle. Transverse 3 in x 1 in x 1 1/2 in Stclidomoolid RF) side cut Int Jugular vein cut same side. RF) side.

1" 1 1/2" 3" depth.

2) Just below 1st wound to rt side. 2" x lin x 1/2" Clericle open.

1" 1/2" depth.
2 1/2"

According to the doctor the cause of death was shock due to Hemorrhage.

18. PW 9 Kerba Tukaram Vhatkar, the father of the deceased has identified the ornaments which were

discovered at the instance of the appellant as being the ornaments of his son.

19. It is basically on the basis of this evidence that the learned Sessions Judge has held that the appellant is guilty of offences punishable under Sections 394 and 302 of the I.P.C.

20. We have not the slightest doubt that the prosecution has proved to the hilt that the deceased was found lying dead in a naked condition in his house on the night of 4/8/2000. The prosecution has also established that the appellant was caught by the prosecution witnesses while he was running away after opening the door of the house of the deceased. This is conclusively established by the evidence of PW 5 Jeevan Kamble, PW 6 Kondiram Hajare and PW 7 Santosh Patil. PW 1 Dharmendra Nikam is a pancha to the inquest panchnama Exhibit-18 and spot panchnama Exh.19. He has also stated that the dead body of the deceased was found in naked condition in his house.

21. We have, however, doubt about the veracity of the prosecution story that the appellant had stolen gold ornaments of the deceased and concealed them

and a sattur in a room in the Yashodhan hostel.

22. PW 3 Kiran Takle has deposed about the statement made by the appellant and the discovery of golden rings, a bracelet and a sattur at his instance. However, we find it difficult to place reliance on this discovery. Admittedly the room in which the appellant was kept confined was an open room. Therefore, it was accessible to everyone. It is not possible to believe that after the appellant was apprehended by the people they did not notice that he was carrying gold ornaments and sattur with him. It is inconceivable that the people would lock the appellant in the room without taking his search to find out what was on his person. Assuming that gold ornaments can be cleverly concealed by the appellant and hence could not be seen by the people, it is difficult to believe that sattur could be concealed by the appellant. We have had a look at the sattur. It is not a small article. It is about 12 inches long and its width is 2 1/2 inches. It is not the case of the prosecution that the appellant was carrying a bag with him. It was impossible for the appellant to conceal such a big weapon on his body. It could have been easily noticed by the people.

Besides one of the prosecution witnesses has said that they had a scuffle with the appellant. If there was a scuffle then obviously the people would have noticed sattur concealed by the appellant on his person. If the appellant had a sattur with him while running away he would have certainly brandished it to scare away the people so as to be successful in his attempt to run away. Therefore, the prosecution case that the appellant had concealed the ornaments and sattur in the room where he was locked by people is not acceptable. We feel that this discovery is foisted upon the appellant to supplement a motive.

23. We are also not impressed by the prosecution case that the appellant had borrowed the scooter of PW 8 Uttam Jadhav and changed its number. PW 8 Uttam Jadhav has said that on 4/8/2000 at about 7-45 in the evening he and one Ajit Panchal went to the shop of the appellant in connection with the repairs of his tape recorder. The appellant told him to bring his tape recorder. Thereafter at 8-30 p.m. they came out of the shop. The appellant requested him to give him his vehicle. His vehicle was of Bajaj company bearing No. MH-09-G-7577. He

asked the appellant why though he had a vehicle he was asking for his vehicle. The appellant told him that he has to recover Rs.11000/- from someone. He further told him that he has purchased his vehicle on loan. The finance company had taken away the vehicle because he had not paid the loan amount. Therefore, he had brought his uncle's vehicle. The appellant told him that he should collect the vehicle in the morning. Accordingly he gave his vehicle to the appellant and took his vehicle. Next day he went to the appellant's shop. It was closed. Thereafter he was called by Shahupuri Police Station. The number of his schooter was changed from 3117 to 8417.

24. In this connection it is necessary to note that none of the prosecution witnesses have stated that they had seen the appellant coming to the deceased on a scooter. Nobody has referred to a scooter being parked near the house of the deceased. In the panchnama Exhibit-20 under which the scooter standing near the house of the deceased was seized, it is stated that No. MZH 8417 found on the number plate was minutely examined and it was noticed that the real number of the scooter was MZH 3117 and No. 3 was changed into No. 8 and No.

1 was changed into No. 4 with a chalk.

25. Panch PW 1 Dharmendra Nikam has stated that the number of the scooter was MZH 8417. The police washed out white colour on the said plate. Thereafter they noticed the MZH 3117. He has stated that No. 3 was converted into 8 and No. 1 was converted into 4. Now his case that the number plate was washed is not stated in the panchnama or by PW 15 PI Jadhav.

26. We also find that though while recording the statement of the appellant under Section 311 of the Code of Criminal Procedure, the appellant has been put questions regarding the seizure of the scooter, no question has been asked to him about change of the number plate. In the circumstances, a doubt is created whether really the appellant had borrowed the scooter of PW 1 Dharmendra Nikam. Though we have no manner of doubt that it is the appellant who has dealt the fatal blows on the deceased, we are of the opinion that the appellant has done so in exercise of his right of private defence. The defence of the appellant is that he had gone to the deceased's house for repairing his TV. The deceased had just come home. He expressed a desire

to have unnatural sex with the appellant. The appellant said no to it. Thereupon the deceased removed all his clothes. He became naked and with a view to having unnatural sex with the appellant and for the purpose of gratifying his unnatural lust he attacked the appellant. The appellant received bruises and contusions. The appellant apprehended that the deceased would force him to have unnatural sex with him. He felt that he may not be able to prevent it and he may fall prey to the deceased's desire for unnatural lust. Since he was certain that he would be a victim of unnatural lust, he picked up a weapon and to protect himself from unnatural sex and assault he attacked the deceased with the weapon. The deceased fell down because of the assault. According to the appellant then he got scared and he surrendered to the police. The appellant denied that he had committed theft of ornaments of the deceased. He stated that he dropped the weapon of assault in the house of the deceased. In our opinion, the appellant has probabalised his defence because the deceased was found lying naked in his house. It is unusual for a person to be moving around in the house naked particularly when a guest visits him. Unless the deceased had some desire to have unnatural sex with

the appellant, who had come to repair his TV he would not be found naked. The defence of the appellant that the deceased attacked him is also borne out by the injuries found on the person of the appellant.

27. PW 17 Dr. Rajeya Maruti Desai had examined the appellant on 5/8/2000 at the C.P.R. hospital Kolhapur. He found the following injuries on the appellant.

1. Abrasion of size 2 c 3 cm. over right Zygomatic region, nature of injury is simple, cause of injury-Hard and blunt object. Colour of injury is black to red in colour.

2. Abrasion 3 x 0.5 cm. over right pinna of ear, simple injury caused by hard and blunt object, black to red in colour.

3. Abrasion 5 x 1 cm. over right delto pectoral region... simple caused by hard and blunt object. red to black in colour.

4. Contusion 3 x 2 over right shoulder, simple, hard and blunt object. Bluish red in colour.

5. Abrasion 4 x 2 cm. overleft leg, simple caused by hard and blunt object.

He issued injury certificate which is at Exhibit 57. Dr. Desai has stated that all the above injuries are possible due to fall during a scuffle. Therefore, it does appear that there was a scuffle between the appellant and the deceased. It was argued that this scuffle was between the appellant and the persons who apprehended him while he was running away. It is not possible to accept this because while PW 5 Jeevan Kamble says that there was a scuffle between the appellant and the persons who apprehended him, PW 6 Dhondiram Hajare who was with Jeevan Kamble says that there was no such scuffle. This variance between the evidence of two prosecution witnesses makes us disbelieve the prosecution story about the scuffle between the appellant and the people who had gathered at the scene of offence. The appellant's case that he surrendered appears to be true. If the appellant had surrendered which appears to be the only thing he could have done considering that many people had gathered there the question of his receiving injuries from people does not arise. All that the

people had to do was to take him to the other room and lock him there. Therefore, the injuries were obviously the result of the scuffle between the appellant and the deceased. The injuries on the appellant probabalise his defence that the deceased had attacked him as he wanted the appellant to submit to his unnatural lust and the appellant had, therefore, to assault him in exercise of his right of private defence.

28. Section 96 of the I.P.C. states that nothing is an offence which is done in exercise of the right of private defence. Section 97 states that every person has a right, subject to restrictions contained in Section 99, to defend his own body, and the body of any other person, against any offence affecting the human body. Section 100 states when the right of private defence of the body extends to causing death. Section 100 so far it is relevant reads thus:

> "100. When the right of private defence of the body extends to causing death -
>
> The right of private defence of the body extends, under the restrictions mentioned in

> the last preceding section, to the voluntary causing of death or of any other harm to the assailant, if the offence which occasions the exercise of the right be of any of the descriptions hereinafter enumerated, namely:-
>
> First_ .....
> Secondly .....
> Thirdly ....,.
> Fourthly _ An assault with the intention of gratifying the lust;

29. In this case, in our opinion, circumstances were such that the appellant was justified in exercising his right of private defence. However, he has exceeded his right. Section 102 of the I.P.C. states that the right of private defence of the body commences as soon as a reasonable apprehension of danger to the body arises from an attempt or threat to commit the offence, though the offence may not have been committed and it survives as long as such apprehension of danger to the body continues.

30. The postmortem notes indicate that the

deceased had received two external injuries. The first injury admeasures 3" x 1" x 1 1/2". Because of this injury transverse juglar vein was cut. Just below this wound, there is another wound which admeasures 2" x 1" x 1/2". These injuries are on the vital part of the body. We feel that either of these injuries could have immobilized the deceased. The appellant was a young man aged about 26 years. The deceased was old. The appellant could have, therefore, averted the attack on him and ran away. It was not necessary for him to give the second blow. Therefore, though the appellant is guilty of culpable homicide he is not guilty of murder. He is guilty of culpable homuicide not amounting to murder.

31. Exception 2 to Section 300 is material for this purpose. It reads thus;

> "Culpable homicide is not murder if the offender, in the exercise in good faith of the right of private defence of person or property, exceeds the power given to him by law and causes the death of the person against whom he is exercising such right of defence without premeditation, and without

any intention of doing more harm than is necessary for the purpose of such defence."

32. We do not find any premeditation in this case because the appellant seems to have picked up the weapon which was lying in the house of the deceased to attack him. If he had intention to kill the deceased, he could have stabbed him in chest. We feel that there was no intention to do more harm than was necessary for the purpose of his defence. He has simply exceeded his right of defence.

33. Once it is held that the appellant is guilty of culpable homicide not amounting to murder for punishment, we will have to turn to Section 304 of the I.P.C. We have already noted that the appellant had no intention to cause death but looking to the nature of the injuries and the weapon used it cannot be said that the appellant had no knowledge that his act is likely to cause death. We are, therefore, of the opinion, that the appellant’s case falls in part II of Section 304 of the I.P.C. and a sentence of seven years R.I. and a fine of Rs.500/-, in default to undergo further R.I. for two months would serve the ends of justice. Hence, we pass the following order:

. The impugned judgment and order dated 31/8/2001 passed by the III Addl. Sessions Judge, Kolhapur in Sessions Case No. 187 of 2000 convicting the appellant under Section 302 of the I.P.C. and sentencing him to life imprisonment and fine of Rs. 200/-, in default to suffer R.I. for one month is set aside.

. Instead the appellant Samir Nijam Landage is convicted for offence under Section 304 Part II of the I.P.C. and sentenced to suffer R.I. for seven years. He is also sentenced to pay a fine of Rs.400/-, in default to undergo further R.I. for two months. Needless to say that the appellant shall get set off for the sentence already undergone.

. Appeal is disposed of in the aforestated terms.

(SMT. RANJANA DESAI,J.)

(D. G. KARNIK, J.)

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Mr. F.R. Shaikh, APP

CORAM:-SMT. RANJANA DESAI &

D. G. KARNIK, JJ.

DATED:-4/5/2006

P.C.

. For the reasons separately stated in the judgment this Court has passed the following order:

. The impugned judgment and order dated 31/8/2001 passed by the III Addl. Sessions Judge, Kolhapur in Sessions Case No. 187 of 2000 is quashed and set aside. Needless to say that the sentence awarded thereunder is quashed and set aside.

. Instead the appellant Samir Nijam Landage is convicted for offence under Section 304 Part II of the I.P.C. and sentenced to suffer R.I. for seven years. He is also sentenced to pay a fine of Rs.400/-, in default to undergo further R.I. for two months. Needless to say that the appellant shall get set off for the sentence already undergone.

. Appeal is disposed of in the aforestated terms.

(SMT. RANJANA DESAI,J.)

(D. G. KARNIK, J.)